

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 24 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0044-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RANDY SCOTT BAILEY,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20010685

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Randy S. Bailey

Florence
In Propria Persona

ESPINOSA, Judge.

¶1 Randy Bailey petitions this court for review of the trial court's order striking his notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and the court's denial of his motion for reconsideration of that order. We will not disturb

these rulings unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 After an attempted escape from an Arizona Department of Corrections (ADOC) facility, Bailey was charged with attempted first-degree escape, promoting prison contraband, and two counts each of aggravated assault with a deadly weapon or dangerous instrument and kidnapping. Pursuant to a plea agreement, he was convicted of two counts of kidnapping. The plea agreement provided that the remaining charges would be dismissed. At sentencing in 2002, the trial court dismissed the remaining charges and sentenced Bailey to aggravated, ten-year prison terms for each kidnapping count, one to be served consecutively to the other after Bailey completed the sentence he currently was serving.

¶3 In September 2010, Bailey filed a notice of post-conviction relief asserting the state had violated the plea agreement because ADOC had relied on the dismissed charges to improperly classify him as requiring “level 5 max custody and isolation.” He also suggested one of the ADOC victims of his crimes had been promoted, controlled his classification, and had “retaliat[ed]” against him by ensuring he was classified as he described. He requested that counsel be appointed. The trial court struck the notice, stating Bailey’s claim did not fall “within the purview of Rule 32.” Bailey then filed a motion for reconsideration, explaining ADOC’s classification was based on a policy that stated his classification considered the severity of his offenses, which was based on the “offense behavior,” and included offenses dismissed pursuant to a plea agreement. Thus, he reasoned, his due process rights had been violated because the state had breached the

plea agreement by promising dismissal “only to subvert that [promise] with a presumption of guilt.” After a hearing, the court “reaffirm[ed] its prior ruling that Rule 32 does not apply in this matter.”

¶4 In his petition for review, Bailey asserts the trial court erred in finding his claim not cognizable under Rule 32 and reurges his argument that the state violated the plea agreement. Although Bailey cites no authority, we observe that our supreme court has stated that a defendant may raise a claim in a Rule 32 proceeding that the state has violated a plea agreement. *See State v. Georgeoff*, 163 Ariz. 434, 437, 788 P.2d 1185, 1188 (1990). But, even assuming Bailey’s claim is cognizable under Rule 32, his notice was not filed timely. Rule 32.4(a) requires a pleading defendant to file a notice of post-conviction relief within ninety days of the final judgment and sentence. Bailey did not file his notice until well over eight years after his sentence had been imposed.

¶5 Nor has Bailey attempted to demonstrate he could not have brought the claim sooner. *See Ariz. R. Crim. P. 32.4(a), 31.2(f)* (permitting untimely notice if failure to file timely “without fault on the defendant’s part”). Although he asserted in his motion for reconsideration he only recently had secured a copy of ADOC’s policy, he did not explain why he was not able to obtain it sooner. *See Ariz. R. Crim. P. 32.2(b)* (trial court shall summarily dismiss untimely notice of post-conviction relief failing to “set forth the substance of the specific [timeliness] exception and the reasons for not raising the claim . . . in a timely manner”). And the documents attached to his motion for reconsideration demonstrate he was informed as early as 2003 that his classification was based, in part, on conduct related to charges dismissed pursuant to his plea agreement.

Accordingly, the trial court did not err in striking Bailey's notice or denying his motion for reconsideration. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (fact trial judge comes to proper conclusion for wrong reason irrelevant; appellate court obliged to affirm trial court's ruling if result legally correct for any reason).

¶6 Although we grant review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge